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No. .....

IN THE

Supreme Court of the United States

October Term 1980

DOMINIC PHILLIP BROOKLIER and SAMUEL ORLANDO SCIORTINO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Appeal from the United States Court of Appeal for the Ninth Circuit.

PETITION FOR A WRIT OF CERTIORARI.

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No. .....

IN THE

Supreme Court of the United States

October Term 1980

DOMINIC PHILLIP BROOKLIER and SAMUEL ORLANDO SCIORTINO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI.

Question Presented.

Whether the United States Court of Appeals for the Ninth Circuit erred in its finding that the Double Jeopardy Clause of the Fifth Amendment had not been violated where petitioners were prosecuted by the Federal Government for conspiracy to commit an extortion in 1974 and, thereafter, successively prosecuted in 1980 by the Federal Government for substantively committing the same extortion.

Parties to the Proceeding.

Petitioners:	DOMINIC PHILLIP BROOKLIER SAMUEL ORLANDO SCIORTINO
Respondent:	UNITED STATES OF AMERICA

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Opinion Reference.

United States Court of Appeals for the Ninth Circuit. Order filed on September 8, 1980, in Case No. 80-1455 (a copy of which is included in the Appendix hereto).

Jurisdiction.

The United States District Court for the Central District of California had jurisdiction in this cause by virtue of Title 18, United States Code, Section 1962(c); Rule 18 of the Federal Rules of Criminal Procedure.

The United States Court of Appeals for the Ninth Circuit had jurisdiction under Title 28, United States Code, Sections 1291 and 1294(1), Rule 37(a) of the Federal Rules of Criminal Procedure, and *Abney v. United States*, 431 U.S. 651 (1977).

Constitutional Provision and Statutes Involved.

Fifth Amendment to United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service and time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18, United States Code, Sections 1961, 1962, and 1963 (as set out in the Appendix hereto).

Statement of the Case.

On July 9, 1974, in the Central District of California, the petitioners, DOMINIC PHILLIP BROOKLIER (hereinafter referred to as "BROOKLIER") and SAMUEL ORLANDO SCIORTINO (hereinafter referred to as "SCIORTINO"), were named in a seven count indictment charging them and others with conspiracy to violate the federal racketeering statute (RICO), extortion, fraud, and aiding and abetting. Count One of that indictment, more specifically, charged BROOKLIER and SCIORTINO with conspiracy through a pattern of racketeering activity to engage in the activities of an enterprise which affected interstate commerce to extort and illegally collect money, property, and gambling debts from persons engaged in legitimate and illegitimate enterprises in violation of Title 18, U.S.C., § 1962(d). Among the charged "acts of racketeering" set out in Count One, was the planning and commission of the extortion of a Los Angeles bookmaker by the name of Sam Farkas. On April 9, 1975, BROOKLIER and SCIORTINO, after substantial negotiations with the government, entered pleas of guilty to Count One of the indictment, and the remaining counts were dismissed. BROOKLIER and SCIORTINO were sentenced to prison terms in the custody of the Attorney General and have, in fact, served their sentences.

On February 20, 1979, BROOKLIER and SCIORTINO, and three others, were named in a five count indictment, which included a substantive RICO count. Count Two of said indictment alleged seven acts of racketeering activity, including the same Farkas extortion which BROOKLIER and SCIORTINO were previously convicted of conspiring to commit by their plea of guilty on April 9, 1975. On March 19, 1979, petitioners filed a motion to dismiss Count Two as violative of the 1975 plea agreement and the Double Jeopardy Clause of the Fifth Amendment. Following the

filing of the government's response and oral argument, the Honorable Harry Pregerson denied the petitioners' motion on October 18, 1979. On October 26, 1979, petitioners, pursuant to Title 28, United States Code, Section 1291, and the authority of *Abney v. United States,* 431 U.S. 651 (1977), filed an interlocutory appeal from the denial of their motion.

On March 18, 1980, prior to the date set for oral argument before the Ninth Circuit, the indictment underlying Count Two of the indictment was dismissed without prejudice due to grand jury irregularities. Thereafter, on April 21, 1980, the interlocutory appeal then pending before the Ninth Circuit (No. 79-1680) was remanded to the District Court and subsequently dismissed.

Petitioners were reindicted on May 15, 1980, with the indictment reading exactly as the indictment previously dismissed. On June 17, 1980, petitioners filed their motion to dismiss Count Two of the indictment on Double Jeopardy and breach of plea bargain grounds. The District Court denied petitioners' motion on June 30, 1980.

On July 9, 1980, petitioners filed their interlocutory notice of appeal in response to the June 30, 1980, denial of their Double Jeopardy dismissal motion relating to Count Two of the indictment before the District Court. On August 1, 1980, the government filed it "Motion to Expedite Oral Argument Date and Ruling", inasmuch as the trial on the merits of this matter was scheduled to commence on September 16, 1980. On August 21, 1980, the Ninth Circuit Court of Appeals granted the government's motion and set forth an expedited briefing schedule.

On September 8, 1980, the United States Court of Appeals for the Ninth Circuit issued its order in Case No. 80-1455, which said order is set forth in the Appendix hereto.

On September 22, 1980, petitioners filed their Petition for Rehearing and Suggestion for Rehearing En Banc with the United States Court of Appeals for the Ninth Circuit.

On September 25, 1980, the petition for rehearing was denied by the Ninth Circuit and the mandate was issued. On October 16, 1980, a Ninth Circuit panel voted to reject the Suggestion for a Rehearing En Banc.

Trial on the underlying indictment commenced on September 30, 1980. On November 14, 1980, verdicts were returned. Both petitioners BROOKLIER and SCIORTINO were convicted on Count Two of the indictment which alleged the Farkas extortion as an act of racketeering. Petitioners were acquitted of Count Three of the indictment (extortion of Theodore Gaswirth in violation of 18 USC 1951) and Count Five of the indictment (obstruction of justice stemming from the killing of Frank Bompensiero in violation of 18 USC 1510). Sentencing in this matter is scheduled for January 12, 1980.

REASON FOR GRANTING THE WRIT.

THE COURT OF APPEALS ERRED WHEN IT DETERMINED THAT THE DOUBLE JEOPARDY CLAUSE WAS NOT VIOLATED BECAUSE IT FAILED TO RECOGNIZE THAT ADDITIONAL PROTECTION BEYOND BLOCKBURGER EXISTS IN THIS SUCCESSIVE PROSECUTION SITUATION.

The Farkas extortion should be considered the "same offense" for purposes of this Court invoking Double Jeopardy protection.

The primary deficiency of the Circuit Court's analysis lies in its failure to recognize that Double Jeopardy protection exists beyond that enunciated by this Court in *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), in successive prosecution situations.[1]

A. The United States Supreme Court Has Stated That Additional Protection Beyond Blockburger Does Exist in Successive Prosecution Situations.

The instant case involves a successive prosecution. It has been stated that the Double Jeopardy Clause serves three primary purposes. First, it protects against a second prosecution for the same offense after an acquittal. Second, it protects against a second prosecution for the same offense after a conviction. Third, it protects against multiple punishments for the same offense. *North Carolina v. Pearce,* 395 U.S. 711, 717, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969); *Brown v. Ohio,* 432 U.S. 161, 165, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977). The scope of each of these protections turns upon the meaning of the words "same offense". Indeed, this Court has indicated that the meaning of this phrase may vary from context to context, so that two charges con-

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[1]The prosecution has always conceded that the 1974 Farkas extortion is factually the same extortion charged in the 1980 indictment.

sidered the same offense so as to preclude prosecution on one charged after an acquittal or conviction on the other need not be considered the same offense so as to bar separate punishments for each charge at a single proceeding. See *Brown v. Ohio, supra,* at 166, 167, n. 6, 53 L.Ed.2d 715, 97 S.Ct. 2221.

The Circuit Court ended its Double Jeopardy inquiry after application of the *Blockburger* test, which has primary significance in multiple charge, single prosecution settings. *Brown v. Ohio, supra,* at 166-167, n. 6, 53 L.Ed.2d 187, 97 S.Ct. 2221. While the *Blockburger* test is a valid starting point for analysis in successive prosecution situations, Petitioners contend that this Court has made it clear that inquiry must not end there.[2]

The *Blockburger* test is only a rule of statutory construction, not a constitutional talisman, *Whalen v. United States,* 63 L.Ed.2d 715, 100 S.Ct. .... (1980); *Iannelli v. United States,* 420 U.S. 770, 785, n. 17, 43 L.Ed.2d 616, 95 S.Ct. 1284 (1975).

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[2]*Brown v. Ohio, supra,* at 166-167, n. 6, 53 L.Ed.2d 187, 97 S.Ct. 2221. While *Brown* found the *Blockburger* test determinative in a successive prosecution situation [crime of theft of automobile barred after conviction of lesser included offense of joyriding.], the Court made it clear that Double Jeopardy protection beyond *Blockburger* exists in a successive prosecution situation. The Court stated that its failure to analyze *Brown* in light of this additional protection was a result of its lesser/greater included offense finding, not because Ashe-Neilsen protection did not exist. Cf., *United States v. Snell,* 592 F.2d 1083 (1979). Petitioners suggest the present case is a factual variant of *Snell.* In *Snell,* the successive prosecution took place immediately after remand by the Ninth Circuit and, therefore, did not constitute repetitive harassment. *Snell, supra* at 1085. In the present case, the Farkas extortion took place in 1973, Petitioners were indicted in 1974, convicted by plea in 1975 and served their prison sentences in 1975 and 1976. The most recent indictment alleging the Farkas extortion was not returned until May 15, 1980. Unlike *Snell,* repetitive harassment exists in the case at bar.

The Supreme Court has recognized that ". . . separate statutory crimes need not be identical—either in constituent elements or in actual proof—in order to be the same with in the meaning of the constitutional prohibition." *Brown v. Ohio,* 431 U.S. 161, 164, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977).[3] The fact, therefore, that the two statutes in question rest on different theoretical bases and could have been charged in separate counts of a single indictment is not dispositive of the issue. Where successive prosecutions are at stake, the guarantee serves ". . . a constitutional policy of finality for the defendant's benefit." *Brown, supra,* at 165, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977), quoting *United States v. Jorn,* 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1970).

B. Petitioners Should Have Been Protected From the Recent Successive Prosecution Based on Ashe-Nielsen Double Jeopardy Protection.

Various factors argue for a determination that the present successive Farkas allegation should be viewed as the same

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[3]It is clear that the Supreme Court has given Double Jeopardy protection against successive prosecutions where an application of the *Blockburger* rule of statutory construction would not have. *In re Nielsen,* 131 U.S. 176, 9 S.Ct. 673, 33 L.Ed. 118 (1889); *Ashe v. Swenson,* 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). In commenting on these cases, the *Brown* court noted that the *Blockburger* test is not the only standard for determining whether successive prosecutions impermissively involve the same offense. Even if two offenses are sufficiently different to permit the imposition ot consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first. *Brown, supra,* at 166 and 167, n. 6, 97 S.Ct. 2221, 53 L.Ed.2d 187. Moreover, Justice Rehnquist, in his dissent in *Whalen, supra,* 63 L.Ed.2d 715, 100 S.Ct. .... , has suggested that the *Blockburger* test, although useful in identifying statutes that define greater and lesser included offenses in the traditional sense, is less satisfactory, and perhaps even misdirected, when applied to statutes defining "compound" and "predicate" offenses, a situation the Supreme Court has not as yet faced in a Double Jeopardy context.

offense so as to give meaning to the constitutional policy of finality.

Retrying petitioners for the Farkas extortion required the relitigation of factual issues resolved in the 1974 case. The factual basis for the plea in the 1974 case indicates that the Farkas extortion was completed. During the taking of the guilty plea, government counsel stated:

> ". . . At the direction of Mr. DeRosa and on occasion Mr. Milano, Sam Farkas was shaken down and he paid in excess of $10,000.00 directly to Mr. Milano . . ."

This is significant because it is clear that the recent successive prosecution of petitioners regarding Farkas required the relitigation of factual issues already resolved by the first in contravention of *Nielsen*. *Brown, supra*, at 166 and 167, n. 6, 97 S.Ct. 2221, 53 L.Ed.2d 187.[4]

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[4]Looking beyond the statutory language in successive prosecution situations for purposes of assessing and invoking Double Jeopardy protection is well accepted. In *Nielsen*, the Court held that "where . . . a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy." *Nielsen, supra*, at 188, 9 S.Ct. 673, 33 L.Ed. 118. In *Whalen, supra*, 63 L.Ed.2d 715, 100 S.Ct. .... , defendant was convicted in the same proceeding of rape ar[illegible] first degree murder for killing the victim while perpetrating the rape. The government's position was that the offenses should not be considered the same for Double Jeopardy purposes so as to prevent cumulative sentencing. The government argued that the felony murder and rape are not the same offense since felony murder does not in all cases require proof of rape. The Court refused, however, to view this question in the abstract and found that in the facts of that particular case proof of rape was a necessary element of proof of the felony murder. In *Illinois v. Vitale*, ... U.S. .... , 27 Cr. L. 3190, 80 Daily Journal D.A.R. 1707 (June 19, 1980), the Court looked to the facts of the case and not to the statutes in the abstract, for purposes of determining a successive prosecution Double Jeopardy issue. Further, in *Sanabria v. United States*, 98 S.Ct. 2170, 2179 (1978), the Court when deciding a Double Jeopardy claim, noted: "The precise manner in which an indictment is drawn cannot be ignored because an important function of the indictment is to ensure that, 'in case any other proceedings are taken against [the defendant] for a similar offense, . . . the record [will] show with accuracy to what extent he may plead a former acquittal or conviction.' *Cochran v. United States*, 157 U.S. 286, 290, 15 S.Ct. 628, 630, 31 L.Ed. 704 (1895)." *Sanabria, supra*, at 2179.

Petitioners' position that the instant successive prosecution should be barred is supported by the only statement in the legislative history of the RICO statute dealing with previously litigated crimes.[5]

> "Here, the prosecution, *absent any prior conviction,* would have to prove beyond a reasonable doubt two illegal acts in order to establish the 'pattern'." 116 Cong. Rec. 35208
> (Remarks of Rep. William F. Ryan, October 5, 1970). [emphasis added].

If one were to accept the Circuit Court's analysis that in this successive prosecution situation the only issue to resolve is a recognition of the conspiracy/substantive dichotomy, the day following petitioners' plea in the 1974 case the government could have successively indicted them for a substantive RICO violation, alleging the precise same acts of racketeering as set forth in the conspiratorial RICO to which they pleaded. This preposterous scenario is not dealt with by the Court in its opinion, but is, nevertheless, no different than what the government did by the inclusion of the Farkas extortion in Count Two of the present case.

Conclusion.

It is submitted that this case provides the Court with an ideal opportunity to clarify the scope of the Double Jeopardy Clause in a successive prosecution situation.

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[5]It is, perhaps, noteworthy at this point to mention that both Justices Brennan and Marshall, in their concurring opinions in *Brown, supra,* at 170, 53 L.Ed.2d 1054, 97 S.Ct. 2912, appear to have taken a position which would ban the 1980 Farkas extortion prosecution because Farkas was not substantively prosecuted as one proceeding with the conspiratorial RICO in 1974. The same is true of their concurring opinion in *Harris v. Oklahoma,* 433 U.S. 682, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977).

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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By DONALD B. MARKS,

Attorney for Petitioner
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APPENDIX.

Order.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee, vs. Dominic Phillip Brooklier and Samuel Orlando Sciortino, Defendants-Appellants. No. 80-1455.

Filed: Sept. 8, 1980

Before: FLETCHER, ALARCON, and CANBY, Circuit Judges.

The district court's denial of the defendants' motion to dismiss is affirmed insofar as it rejects their double jeopardy defense. Under the test established in *United States v. Blockburger*, 284 U.S. 299 (1932), the defendants could have been charged in separate counts of a single indictment with both conspiracy to violate RICO and with substantive violations of RICO. *Iannelli v. United States*, 420 U.S. 770 (1975); *United States v. Rone*, 598 F.2d 564 (9th Cir. 1979), *cert. denied, sub nom. Little v. United States*, 100 S. Ct. 1345 (1980). The *Blockburger* test applied to post-conviction prosecutions. *Illinois v. Vitale*, 100 S. Ct. 2260 (1980); *Brown v. Ohio*, 432 U.S. 161 (1977); *United States v. Solano*, 605 F.2d 1141 (9th Cir.), *cert. denied*, 444 U.S. 1020 (1980); *United States v. Snell*, 592 F.2d 1083 (9th Cir.), *cert. denied*, 442 U.S. 944 (1979).

We express no opinion about the district court's denial of the defendant's motion to dismiss insofar as it rejects their contention that their plea bargain was breached. That issue is not raised in this interlocutory appeal.

An opinion may follow.

Chapter 96—Racketeer Influenced and Corrupt Organizations.

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473, relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband ciga-

rettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11; fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) ''State'' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) ''person'' includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) ''enterprise'' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) ''pattern of racketeering activity'' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) ''unlawful debt'' means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under

State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) ''racketeering investigator'' means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) ''racketeering investigation'' means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) ''documentary material'' includes any book, paper, document, record, recording, or other material; and

(10) ''Attorney General'' includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative pro-

visions of this chapter or the investigative power of such department or agency otherwise conferred by law.

Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 941, and amended Pub.L. 95-575, § 3(c), Nov. 2, 1978, 92 Stat. 2465; Pub.L. 95-598, Title III, § 314(g), Nov. 6, 1978, 92 Stat. 2677.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in,

or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 942.

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more that $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 943.

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SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI.

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October Term 1980

DOMINIC PHILLIP BROOKLIER and SAMUEL ORLANDO SCIORTINO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI.

Petitioners hereby respectfully supplement their Petition for Writ of Certiorari as filed on December 5, 1980, by including the expanded opinion issued by the United States Court of Appeals, Ninth Circuit, decided on January 23, 1981.

Respectfully submitted,

MARKS & BROOKLIER,
By DONALD B. MARKS,
Attorneys for Petitioners.

Opinion.

United States of America, Plaintiff-Appellee, v. Dominic Phillip Brooklier and Samuel Orlando Sciortino, Defendants-Appellants. No. 80-1455.

United States Court of Appeals, Ninth Circuit.

Submitted Aug. 18, 1980.

Decided Jan. 23, 1981.

Defendants moved to have charge dismissed under double jeopardy clause. The United States District Court for the Central District of California, Terry J. Hatter, Jr., J., entered judgment denying the motion. On defendants' interlocutory appeal, the Court of Appeals, Fletcher, Circuit Judge, held that Government could charge defendant with violations of Racketeer Influenced and Corrupt Organization Act, including conspiracy to extort from particular victim, and, after conviction, charge defendants with RICO violations including actual extortion from such victim where Government initially could have charged defendants with both conspiracy and underlying offense of extortion.

Affirmed.

Appeal from the United States District Court for the Central District of California.

Before FLETCHER, ALARCON, and CANBY, Circuit Judges.

FLETCHER, Circuit Judge:

In 1974 Dominic Brooklier and Samuel Sciortino were indicted for several counts of violating the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. §§ 1961-1968 (1976). Count I charged them with conspiring to conduct an extortion ring in violation of 18 U.S.C.

§ 1962(d) (1976).[1] One specific charge was that the defendants had conspired to extort money from Sam Farkas, a bookie. Several overt acts, including those resulting in the actual extortion from Farkas, were cited as being in furtherance of the conspiracy. On April 19, 1975, pursuant to a plea bargain, the defendants pled guilty to Count I and the other charges were dismissed.

Four years later the defendants were again indicted for violating RICO. Count II of the new indictment charged them with violations of 18 U.S.C. § 1962(c) (1976).[2] Most of the charges related to threats, extortion, and murder occurring after the 1975 conviction. One charge, however, revived the Sam Farkas incident. The government alleged that:

> In or about the Spring of 1973, in Los Angeles, California, the defendants extorted and caused the extortion of United States currency from Sam Farkas . . . .

Both the 1974 and 1979 charges related to a single incident of extortion from Farkas.

The defendants moved to have Count II dismissed under the double jeopardy clause insofar as it related to the Farkas extortion because they had already been convicted of conspiring to extort. The district judge denied the motion. The defendants brought this interlocutory appeal under *Abney*

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[1] 18 U.S.C. § 1962(d) (1976) makes it unlawful to conspire to violate the substantive provisions of RICO.

[2] 18 U.S.C. § 1962(c) (1976) provides:

> It shall be unlawful for any person employed by or associated with eny enterprise engaged in . . . interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . .

18 U.S.C. § 1961(1)(A) (1976) defines "racketeering activity" as including extortion. 18 U.S.C. § 1961(5) (1976) defines a "pattern" of racketeering activity as at least two acts thereof.

v. United States, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977).[3]

The double jeopardy clause of the fifth amendment states that "No person . . . shall . . . be subject for the same offence to be twice put in jeopardy . . . ." It establishes three distinct protections: (1) against a second prosecution for the same offense after acquittal; (2) against a second prosecution for the same offense after conviction; (3) against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969). This appeal implicates the second protection. The only question presented is whether the government may charge a defendant with RICO violations including conspiracy to extort from Sam Farkas, and, after conviction, charge him with RICO violations including actual extortion from Sam Farkas.

The government insists that the *Blockburger* test is dispositive. In *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), the Supreme Court considered whether several offenses charged in a single prosecution were sufficiently different to permit the imposition of multiple sentences without violating the double jeopardy clause. It established a test emphasizing a comparison of the elements of the offenses:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

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[3]The defendants also contend that the government violated its agreement to dismiss all charges related to the Farkas incident in return for a guilty plea to one charge. This argument is not raised by this interlocutory appeal.

284 U.S. at 304, 52 S.Ct. at 182. The government's contention in the instant case rests on two propositions. The first is that *Blockburger* would have permitted the government to charge the defendants in a single prosecution with both violating RICO by conspiring to extort from Farkas and with violating RICO by actually extorting from Farkas. The second is that the *Blockburger* test applies without modification to all post-conviction prosecutions. The first proposition is irrefutable, the second problematic.

In *Iannelli v. United States*, 420 U.S. 770, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975), the Supreme Court held that under *Blockburger* a defendant could be charged in a single indictment with conspiracy and with the underlying substantive offense. Our court applied *Iannelli* to a RICO prosecution in *United States v. Rone*, 598 F.2d 564 (9th Cir. 1979), *cert. denied, sub nom. Little v. United States*, 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 780 (1980). Therefore, it is clear that the government initially could have charged defendants Brooklier and Sciortino with both conspiracy and the underlying substantive offense. *See United States v. Wylie*, 625 F.2d 1371 at 1381-82 (9th Cir. 1980).

The more difficult question is whether the *Blockburger* "same elements" test applies without modification to post-conviction prosecutions, *i. e.*, government attempts to bring charges that could have been joined with earlier charges but were not.

In analyzing the breadth of *Blockburger's* application, it is important to be mindful of the three distinct protections embraced by the double jeopardy clause. Since *Blockburger* itself involved several charges brought in a single prosecution, it directly implicated only the protection against multiple punishments. The inquiry in such cases is limited to ascertaining the extent of the punishment authorized by

Congress. *See United States v. Wylie*, 625 F.2d at 1381 (9th Cir. 1980).

A post-conviction indictment, in contrast, implicates not only the protection against multiple punishments but also the protection against a second prosecution after conviction. This protection arises from classic double jeopardy concerns that a defendant not be forced to "run the gauntlet" twice. Even if the government could have initially prosecuted a defendant for multiple offenses, further analysis is necessary if it charges him with only one and holds the others in reserve. Policies of assuring finality, sparing defendants the financial and psychological burdens of repeated trials, preserving judicial resources, and preventing prosecutorial misuse of the indictment process all come into play. *See generally* J. Sigler, *Double Jeopardy* 156 (1969); *The Supreme Court, 1976 Term*, 91 Harv.L.Rev. 70, 108 (1977).

Many commentators, drawing on these policies, suggest that the *Blockburger* test should be applied only to single prosecutions and not to successive ones. Regarding the latter, they advocate requiring joinder of all charges arising from the same transaction. Charges arising from a single transaction would have to be brought in a single prosecution; those omitted would be waived.[4] *See, e. g.*, J. Sigler, *Double Jeopardy* 222-28 (1969); Note, *The Double Jeopardy*

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[4]Proponents of the same transaction test admit that there would be problems, albeit manageable ones, with defining a single transaction. *See, e. g., Ashe v. Swenson*, 397 U.S. 436, 454 n.8, 90 S.Ct. 1189, 1199 n.8, 25 L.Ed.2d 469 (1970) (Brennan, J., concurring). They also commonly advocate building certain safeguards into the test. For example, it has been suggested that successive prosecutions for offenses arising from a single transaction should not constitute double jeopardy if the separate trials are caused by the defendant's tactical moves, or if the second trial is due to the discovery of new evidence. *See, e. g.*, Note, *The Double Jeopardy Clause as a Bar to Reintroducing Evidence*, 89 Yale L.J. 962, 977 (1980).

Clause as a Bar to Reintroducing Evidence, 89 Yale L.J. 962, 967-69, 976-81 (1980); *The Supreme Court, 1976 Term*, 91 Harv.L.Rev. 70, 106-114 (1977). This approach, labelled the "same transaction" test, has been adopted by the drafters of the ABA Criminal Justice Standards, *ABA Standards Relating to Joinder and Severance* § 1.3(c) (Approved Draft 1968), and the Model Penal Code, American Law Institute, *Model Penal Code* § 1.08-2(c) (Proposed Official Draft 1962). Its most eloquent spokesman is Justice Brennan. In *Abbate v. United States*, 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959), for example, he stated that:

> to allow successive prosecutions of the several offenses, rather than merely the imposition of consecutive sentences after one trial of those offenses, would enable the Government to "wear the accused out by a multitude of cases with accumulated trials." Repetitive harassment in such a manner goes to the heart of the Fifth Amendment protection.

359 U.S. at 200, 79 S.Ct. at 673 (concurring opinion) (citation omitted). *See also Ashe v. Swenson*, 397 U.S. 436, 448-60, 90 S.Ct. 1189, 1196-1202, 25 L.Ed.2d 469 (1970) (Brennan, J., concurring).[5] *Cf.* Note, *The Double Jeopardy Clause as a Bar to Reintroducing Evidence*, 89 Yale L.J. 962, 967-69, 976-81 (1980) (advocating a variant of the double jeopardy test whereby facts alleged in one prosecution could not be alleged in a later one).

The Supreme Court has never expressly rejected the same transaction test. It has, however, declined to strictly apply the *Blockburger* test to post-acquittal prosecutions, thereby

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[5]Justice Brennan has espoused the same transaction test in a series of concurrences and dissents, which he lists in his dissent to the denial of certiorari in *Thompson v. Oklahoma*, 429 U.S. 1053, 1054, 97 S.Ct. 7680, 50 L.Ed.2d 770 (1977).

indicating that *Blockburger* is not dispositive of all successive prosecutions. *Ashe v. Swenson,* 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970).[6]

Several circuit courts have nevertheless concluded that the *Blockburger* test governs all double jeopardy claims save those precisely within the ambit of *Ashe v. Swenson*. Among them is our own circuit. *See, e. g., United States v. Solano,* 605 F.2d 1141 (9th Cir. 1979), *cert. denied sub nom. England v. United States,* 444 U.S. 1020, 100 S.Ct. 677, 62 L.Ed.2d 652 (1980); *United States v. Sneii,* 592 F.2d 1083 (9th Cir.), *cert. denied,* 442 U.S. 944, 99 S.Ct. 2889, 61 L.Ed.2d 315 (1979); *Brown v. Alabama,* 619 F.2d 376 (5th Cir. 1980); *United States v. Clark,* 613 F.2d 391 (2d Cir. 1979); *United States v. Brown,* 604 F.2d 557 (8th Cir. 1979). These conclusions are based on an interpretation of *Brown v. Ohio,* 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), in which the defendant was convicted of "joyriding" and then prosecuted for auto theft. State law defined joyriding as a lesser included offense of auto theft. The Court held that the double jeopardy clause barred indictment for a greater offense after conviction for a lesser included offense, expressly applying the analysis set forth in *Blockburger*. The Court, though, did not declare the *Blockburger* test dispositive of all post-conviction prosecutions. In fact, the *Brown* holding is a very narrow one that follows directly from *Blockburger*. At no time could Brown have been charged with both joyriding and auto theft. The former is a lesser included offense of the latter; to charge him with both, even in a single prosecution, would violate the *Blockburger* test. If *Blockburger* barred simultaneous prosecu-

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[6]In *Ashe v. Swenson,* Ashe allegedly robbed six poker players in a single incident. He was first prosecuted for robbing four of the gamblers. After acquittal he was prosecuted for robbing the other two. The Court held that principles of collateral estoppel barred the second trial.

tion, *a fortiori* it barred successive prosecutions. 432 U.S. at 166, 97 S.Ct. at 2225.

Because *Brown* does not expand on *Blockburger*, it sheds no light on the standard which should be applied to successive prosecutions. Although *Blockburger* is a useful starting point, such cases involve dangers which seem to require interposition of additional protections. *See Jordan v. Virginia*, —— F.2d ——, No. 78-6540 (4th Cir. June 2, 1980). We do not believe that *Brown* should be interpreted as necessarily requiring strict application of the *Blockburger* test to all post-conviction prosecutions. We also recognize many advantages of the same transaction test espoused by Justice Brennan and might well be moved to adopt it if we had free rein.[7]

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[7]The two Ninth Circuit cases interpreting *Brown* as applying *Blockburger* to all post-conviction prosecutions may have read *Brown* more broadly than was necessary. In *United States v. Solano*, 605 F.2d 1141 (9th Cir. 1979), *cert. denied sub nom. England v. United States*, 444 U.S. 1020, 100 S.Ct. 677, 62 L.Ed.2d 652 (1980), Solano had been prosecuted in 1968 for manufacturing drugs and conspiring to do so, and had been convicted. He was prosecuted in 1979 for RICO conspiracy charges that included, as overt acts, transactions subsumed by the prior conviction. The court rejected Solano's double jeopardy contention, applying the *Blockburger* test under the authority of *Brown* and finding no double jeopardy because the offenses comprised different elements.

In *United States v. Snell*, 592 F.2d 1083 (9th Cir.), *cert. denied*, 442 U.S. 944, 99 S.Ct. 2889, 61 L.Ed.2d 315 (1979), Snell was prosecuted for attempted extortion and conspiracy to commit bank robbery, and was convicted. When the conspiracy conviction was reversed on appeal the government began a new prosecution for attempted bank robbery. Snell contended that the new prosecution contravened the double jeopardy clause, asking the court to adopt Justice Brennan's same transaction test. The court declined the invitation, applied the *Blockburger* test, and held that double jeopardy did not lie. The court rejected Justice Brennan's same transaction approach because it "has not been adopted by the Supreme Court or this court; in [*Walker v. Loggins*, 608 F.2d 731 (9th Cir. 1979)] we reaffirmed our adherence to the traditional *Blockburger* standard." 592 F.2d at 1085. The fact that the Supreme Court had not adopted the Brennan approach is not controlling, however, since the court had never considered a case squarely posing the issue. *Walker v. Loggins* does not appear to be on point; it is a basic *Blockburger* case involving a single prosecution for several offenses *See also United States v. Snell*, 627 F.2d 186 (9th Cir. 1980) (rejecting Snell's attempt to reassert his double jeopardy claim).

We believe such a course is precluded, however, not only by the decisions of this circuit in *United States v. Solano* and *United States v. Snell,* but also by the Supreme Court's recent decision in *Illinois v. Vitale,* —— U.S. ——, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980). In *Vitale,* the defendant struck and killed two small children while driving an automobile. He was immediately cited for failing to slow to avoid pedestrians, and he pled guilty. Soon thereafter he was charged with voluntary manslaughter. He interposed a double jeopardy defense, and the Court remanded for a state court determination of the legal relationship between the two crimes. In so doing, the Court interpreted *Brown* as importing the *Blockburger* test to all post-conviction prosecutions, describing it as "the principal test for determining whether two offenses are the same for the purposes of barring successive prosecutions." 100 S.Ct. at 2265. The disposition in *Vitale* also seems to reject the same transaction test. Under that test there would be no need to remand, since the two offenses for which Vitale was successively prosecuted clearly arose from the same transaction.

The *Vitale* Court did not discuss the difficult questions raised by post-conviction prosecutions and we doubt that it intended to resolve them *sub silentio*. Nevertheless, we read *Vitale* as a tacit endorsement of the view that the *Blockburger* test, and nothing more, governs all post-conviction prosecutions. We must, of course, follow the Supreme Court's dictates however they are expressed. If the law of successive prosecutions is to be modified or clarified in this or some other more appropriate case, it will have to be by the Supreme Court and not by this panel.

The *Blockburger* test would permit simultaneous prosecution of the two charges at issue here. It was therefore permissible for the government to prosecute them successively. The judgment of the district court is affirmed.[8]

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[8]The defendants rely heavily on *In re Nielsen*, 131 U.S. 176, 95 S.Ct. 672, 33 L.Ed. 118 (1889). In that case Nielsen, a Mormon, was prosecuted for bigamous cohabitation, convicted, and then prosecuted for committing adultery the day after the cohabitation period ended. The court reversed the second conviction on double jeopardy grounds. Defendants Brooklier and Sciortino assert that *Nielsen* establishes a generic exception to the *Blockburger* test, one that encompasses their case. They base their assertion on a footnote to the *Brown* opinion in which the court discussed *Nielsen*, 432 U.S. at 166 n.6, 97 S.Ct. at 2226 n.6.

The defendants read far too much into *Nielsen*. It is an aberrational case from which it is impossible to discern a general rule, and the Court's footnote in *Brown* merely acknowledges that *Nielsen* might not fit the precise parameters of *Blockburger*. In the text of the *Brown* opinion, moreover, the Court implied that *Nielsen* is generally consistent with the *Blockburger* formulation, citing it for the proposition that when the same elements test bars a single prosecution for several offences it also bars their successive prosecution. 432 U.S. at 166, 97 S.Ct. at 2225. *See also Illinois v. Vitale*, 100 S.Ct. 2260, 2267 (1980); *United States v. Snell*, 592 F.2d 1083, 1085 n.2 (9th Cir.), *cert. denied*, 442 U.S. 944, 99 S.Ct. 2889, 61 L.Ed.2d 315 (1979). As we have noted *supra*, slip op. at pp. 28-29, at p. —, the defendants in the instant case could have been prosecuted in a single trial for the two offenses at issue here. Consequently, even if *Nielsen* establishes a generic exception to *Blockburger*, that exception does not apply here.

No. 80-921

In the Supreme Court of the United States

OCTOBER TERM, 1980

DOMINIC PHILLIP BROOKLIER AND
SAMUEL ORLANDO SCIORTINO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In this petition following an interlocutory appeal pursuant to *Abney* v. *United States*, 431 U.S. 651 (1977), petitioners contend that their prosecution on one count of a 1979 indictment charging a substantive RICO offense[1] was barred by the Double Jeopardy Clause in light of their 1974 convictions on a RICO conspiracy count.

1. In 1974, petitioners were indicted in the United States District Court for the Central District of California on seven counts charging conspiracy to conduct an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d) (Count I), conspiracy to obstruct interstate commerce by means of extortion, in violation of 18 U.S.C.

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[1]Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*

1951 (Count II), conspiracy to use extortionate means to collect an extension of credit, in violation of 18 U.S.C. 894 (Count III), obstruction of interstate commerce by means of extortion, in violation of 18 U.S.C. 1951 (Counts IV, V, VI), and devising a scheme to defraud and to obtain money by false pretenses, in violation of 18 U.S.C. 2314 (Count VII). Petitioners pleaded guilty to the RICO conspiracy charge (Count I), and the remaining six counts of the indictment were dismissed. Petitioner Brooklier was sentenced to 20 months' imprisonment, and petitioner Sciortino was sentenced to 15 months' imprisonment. No appeal was taken.

The RICO conspiracy count in the 1974 indictment charged that petitioners and 10 others were "associated with an enterprise * * * [under RICO], to wit, a group of individuals associated in fact to shakedown, extort, defraud and illegally collect money, property and gambling debts from persons engaged in legitimate and illegitimate enterprises * * *." The indictment further alleged that petitioners conspired to participate in the conduct of the affairs of this enterprise through a pattern of racketeering activity. Among the 54 overt acts charged in this count, four overt acts pertained to the extortion of money from bookmaker Sam Farkas in June 1973. This extortionate scheme was not charged in any of the substantive counts of the indictment.

2. In 1979, petitioners were indicted in the United States District Court for the Central District of California on four counts charging conspiracy to conduct an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d) (Count I), conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c) (Count II), obstructing interstate commerce by extortion, in violation of 18 U.S.C. 1951(a) (Count III), and using force to prevent Frank Bompensiero from com-

municating information concerning criminal offenses to the FBI, in violation of 18 U.S.C. 1510 (Count V).[2]

Prior to trial, petitioners moved to strike Count II of the 1979 indictment on the ground that the Double Jeopardy Clause prohibited prosecution on this charge in light of their convictions on Count I of the 1974 indictment. Count II of the 1979 indictment, charging a substantive RICO violation, named seven predicate acts of racketeering. Among those was the 1973 extortion of Sam Farkas, which had been referred to as an overt act in the RICO conspiracy count of the 1974 indictment. Petitioners alleged that because both the 1974 RICO conspiracy charge and the 1979 RICO substantive charge included the 1973 extortion of Sam Farkas, their convictions on the 1974 charge barred their prosecution on the 1979 charge. The district court denied petitioners' double-jeopardy motion. Petitioners took an immediate appeal from this ruling pursuant to *Abney* v. *United States*, *supra*, and the court of appeals affirmed (Pet. App. 1).[3]

3. On November 14, 1980, petitioners were convicted by a jury on Count II of the 1979 indictment. Petitioner Brooklier was also convicted on Count I. On December 5, 1980, Brooklier and Sciortino filed the instant petition for a writ of certiorari seeking review of the Ninth Circuit's disposition of their *Abney* appeal. Thereafter, Brooklier was sentenced to concurrent terms of four years' imprisonment on each count, and Sciortino was sentenced to four years' imprisonment and fined $25,000. On January 20, 1981,

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[2]The 1979 indictment was subsequently superseded by an identical indictment returned on May 15, 1980.

[3]On January 23, 1981, the court of appeals issued an opinion setting forth the reasons for its earlier order of affirmance. See No. 80-1455 (9th Cir.). A copy of this opinion was submitted to the Court by petitioners' letter of January 28, 1981, and their Supplemental Appendix to Petition for Writ of Certiorari (filed Feb. 4, 1981).

petitioners filed notices of appeal from the district court's final judgment of conviction and sentence. See Nos. 81-1045, 81-1046 (9th Cir.).

4. Review of petitioners' double-jeopardy claim would be inappropriate at this stage. The instant petition arises from the denial of a pretrial motion to dismiss Count II of the 1979 indictment, not from a final judgment of conviction. Although the district court's order denying the motion to dismiss was immediately appealable because petitioners invoked the protection of the Double Jeopardy Clause "against being twice put to *trial* for the same offense" (*Abney* v. *United States, supra*, 431 U.S. at 661), that rationale is no longer applicable in this case. Since the time their *Abney* appeal was filed and resolved against them by the court of appeals, petitioners have been tried, convicted, and sentenced. Accordingly, the *Abney* analysis allowing a pretrial appeal in order to avoid a second trial is inapposite here.

In its present posture, this case involves the question whether the Double Jeopardy Clause protects petitioners from being punished—not tried—on Count II of the 1979 indictment. As the Court recognized in *Abney* v. *United States*, *supra*, 431 U.S. at 660, this aspect of the protection afforded by the Double Jeopardy Clause "can be fully vindicated on an appeal following final judgment * * * ." Thus, once the trial has been completed, immediate review under *Abney* should not be available even in the court of appeals, and a fortiori not in this Court. Instead, recourse must be had to the customary appellate process by seeking review of the final judgment of conviction and sentence.

Indeed, petitioners have now filed notices of appeal from the final judgment of the district court. Adherence to the usual appellate procedure will enable the court of appeals, and eventually this Court, to consider all of petitioners' claims at one time rather than in a piecemeal fashion. See

Hamilton-Brown Shoe Co. v. *Wolf Brothers*, 240 U.S. 251, 257-258 (1916); cf. *Cobbledick* v. *United States*, 309 U.S. 323, 324-326 (1940). And, if petitioners prevail on some other ground in the court of appeals, it may never be necessary for this Court to pass upon their double-jeopardy contention.[4] In these circumstances, further review of the case at this juncture is unwarranted.[5]

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[4]We also note that petitioner Brooklier received concurrent sentences on Counts I and II. Thus, it may be unnecessary to consider his constitutional challenge to Count II. See *Andresen* v. *Maryland*, 427 U.S. 463, 469 n.4 (1976); *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973).

[5]In addition, petitioners' claim is without merit. "Traditionally the law has considered conspiracy and the completed substantive offense to be separate crimes." *Iannelli* v. *United States*, 420 U.S. 770, 777 (1975). Hence, the Double Jeopardy Clause does not bar successive prosecutions for the distinct offenses of conspiracy and the consummated crime.

Moreover, the matter common to both charges that is the basis for petitioners' double-jeopardy claim—the Farkas extortion in 1973—was merely an evidentiary means for the government to prove the charges against petitioners rather than an indispensable element of the offenses. Apart from the Farkas extortion, the 1974 RICO conspiracy count and the 1979 RICO substantive count involved completely unrelated transactions engaged in by entirely different people (except for petitioners themselves) during different time periods and with different victims. The 1974 RICO conspiracy charge concerned the illegal collection of gambling debts, while the 1979 RICO substantive charge principally pertained to the extortion of money from pornographers, and most of the predicate acts of racketeering in the 1979 RICO substantive count occurred after petitioners had served their sentences on the earlier conspiracy charge. Surely the Double Jeopardy Clause does not prohibit the government from using overlapping evidence at separate trials to prove quite distinct crimes.

Finally, even if petitioners' claim were correct, the proper remedy would be to strike the challenged portion of Count II of the 1979 indictment, not to dismiss the count in its entirety (and certainly not to bar trial on the other counts). As petitioners conceded in the court of appeals, nothing in the Double Jeopardy Clause prevents them from being charged on the " 'fresh' racketeering acts alleged in Count II" (Appellants' Supplemental Brief, at 7).

It is therefore respectfully submitted that the petition for a writ of ceritorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1981

DOJ-1981-02